

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK ROY BOWERS,

Defendant-Appellant.

UNPUBLISHED

September 12, 1997

No. 191180

St. Clair Circuit Court

LC No. 95-001409-FC

Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Defendant appeals by right his jury convictions of kidnapping, MCL 750.349; MSA 28.581, and assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, the latter standing in contrast to the original charge of assault with intent to murder. This case is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant claims that he was deprived of the effective assistance of counsel at trial because counsel conceded, during closing argument, that defendant could properly be found guilty at least of aggravated assault and possibly of assault with intent to commit great bodily harm less than murder. As a general proposition, such a tactic, conceding defendant's guilt of a lesser included offense, while arguing that the capital charges, which would have exposed defendant to life imprisonment had not been sustained, does not constitute ineffective assistance of counsel under the applicable standard of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), adopted in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

Here, defendant's trial counsel, although having presented an insanity and diminished capacity defense, had an advantage that this Court cannot replicate, namely, having evaluated the impact of that testimony and of the prosecutor's closing argument on the actual jury by observing the jurors' faces, eyes, and body language, *inter alia*. A minimally competent criminal defense practitioner could reasonably conclude, as a strategic matter, that the best available option was to make precisely that kind of closing argument. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995).

Affirmed.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael R. Smolenski